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Settlement of commercial disputes

International commercial mediation: draft convention on international settlement agreements resulting from mediation

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[6]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft convention with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft amended Model Law with annotations is contained in document A/CN.9/943.

II. Draft convention on international settlement agreements resulting from mediation

A. Text of the draft convention

4. The text of the draft convention reads as follows.

"United Nations Convention on International Settlement Agreements Resulting from Mediation

"Preamble

"*The Parties to this Convention,*

"*Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.

[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

[7] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

"*Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

"Article 1. Scope of application

"1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement') which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

"3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"Article 2. Definitions

"1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so

as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"3. 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

"4. 'Seeking relief' means a party to a settlement agreement requesting enforcement of a settlement agreement under article 3, paragraph 1, or invoking a settlement agreement under article 3, paragraph 2. Similarly, 'granting relief' means a competent authority enforcing a settlement agreement under article 3, paragraph 1, or allowing a party to invoke a settlement agreement under article 3, paragraph 2.

"Article 3. General principles

"1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

"Article 4. Requirements for reliance on settlement agreements

"1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

"5. When considering the request for relief, the competent authority shall act expeditiously.

"Article 5. Grounds for refusing to grant relief

"1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

"Article 6. Parallel applications or claims

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper,

adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

"Article 7. Other laws or treaties

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

"Article 8. Reservations

"1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

"Article 9. Effect on settlement agreements

"The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

"Article 10. Depositary

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"Article 11. Signature, ratification, acceptance, approval, accession

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

"Article 12. Participation by regional economic integration organizations

"1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

"2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a 'Party to the Convention', 'Parties to the Convention', a 'State' or 'States' in this Convention applies equally to a regional economic integration organization where the context so requires.

"4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1(1) are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

"Article 13. Non-unified legal systems

"1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

"4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

"**Article 14. Entry into force**

"1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval, or accession.

"2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

"**Article 15. Amendment**

"1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

"3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

"4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

"5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

"**Article 16. Denunciations**

"1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

"2. The denunciation shall take effect twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic."

B. Annotations

1. Terminology

5. The Commission may wish to note the decision of the Working Group to replace the term "conciliation" by "mediation" throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (A/CN.9/934, para. 16), which would be used with necessary adjustments when revising existing UNCITRAL texts on conciliation (for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The explanatory text reads as follows:

> "'*Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the Convention on International Settlement Agreements Resulting from Mediation and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), the Commission decided to use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the instruments. This change in terminology does not have any substantive or conceptual implications.*"

2. Title and preamble

6. The Working Group tentatively approved the title of the draft convention (A/CN.9/934, para. 143) as well as the preamble (A/CN.9/934, para. 145). The Commission may wish to note the adjustments made to the preamble resulting from the decision of the Working Group to use the word "mediation" instead of the generic phrase "dispute settlement methods".

3. Reference to "Party/Parties to the Convention"

7. The draft convention tentatively uses the terms "a Party to the Convention" or "Parties to the Convention", instead of referring to "Contracting State(s)" for the reason that the term "Contracting State(s)" is referred to in article 2(1)(f) of the Vienna Convention on the Law of Treaties to mean a State which consents to be bound by the treaty, whether or not the treaty has entered into force (A/CN.9/934, paras. 116–118). The Commission may wish to note that the term "Contracting States" has been used in existing conventions in the field of international trade law, with the purpose of avoiding confusions between the Parties to the convention and the parties to the contractual relation covered by the convention.[8] The Commission may wish to consider the term that should be used under this draft convention.

4. Remarks on article 1 — Scope of application

8. Paragraph 1 introduces the generic term "settlement agreement" (A/CN.9/896, para. 146). The Commission may wish to note that reference to "international

[8] See, for instance, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), United Nations Convention on the Limitation Period in the International Sale of Goods (1974), United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980), United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995), United Nations Convention on the Assignment of Receivables in International Trade (2001), United Nations Convention on the Use of Electronic Communications in International Contracts (2005), United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules, 2008), HCCH Convention on Choice of Court Agreements, 2005.

agreements" has been avoided in paragraph 1 as that expression often refers to agreements between States or other international legal persons binding under international law (A/CN.9/934, para. 17). Therefore, paragraph 1 reflects the modification agreed by the Working Group in that respect.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 18 and 21; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94; for consideration of the notion of internationality, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98; and A/CN.9/861, paras. 33–39.

- *Exclusions: personal, family, inheritance, employment matters — settlement agreement enforceable as a judgment or as an arbitral award*

9. Paragraphs 2 and 3 address exclusions from the scope of the draft convention. The Commission may wish to note that paragraph 3 aims at avoiding possible overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law (A/CN.9/896, para. 49).

For approval of article 1(2) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43.

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–216; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28.

5. Remarks on article 2 — Definitions

10. Paragraphs 1 to 3 of article 2 (previously numbered art. 3, see A/CN.9/934, para. 139(ii)) contain definitions approved in substance by the Working Group.

11. The Commission may wish to consider whether the definition of the terms "electronic communication" and "data message" could be deleted from paragraph 2. The purpose of the draft convention is not to address these matters in detail and definitions are contained in other United Nations and UNCITRAL instruments, which could be used as a reference in the context of the draft convention. Further, the definition of these terms may not fully reflect technological developments in this field over time, and amending the convention to reflect such developments might not be practicable.

12. As a matter of drafting, the Commission may wish to note that the words "regardless of the expression used and irrespective of the basis upon which the process is carried out" in paragraph 3 have been replaced by the words "irrespective of the expression used or the basis upon which the process is carried out".

13. The Commission may wish to consider paragraph 4, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions under the draft convention as defined under article 3 (A/CN.9/934, para. 138).

For approval of the definitions under article 2, paragraphs 1 to 3, see:

- Regarding paragraph 1, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 26 and 28; for consideration of the matter at previous

sessions, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, para. 101; and A/CN.9/861, paras. 33–39

- Regarding paragraph 2, at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133
- Regarding paragraph 3, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

6. Remarks on article 3 — General principles

14. Article 3 (previously numbered art. 2, see A/CN.9/934, para. 139(ii)) provides for States' obligations under the draft convention regarding both enforcement of settlement agreements (para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (para. 2).

For approval of article 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79).

7. Remarks on article 4 — Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 4 reflects a balance between, on the one hand, the formalities that are required to ascertain that a settlement agreement result from mediation and, on the other, the need for the draft convention to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of simplification and consistency between paragraphs 3 and 4, the words "the party requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 4 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; see A/CN.9/896, paras. 67–75, 82 and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

8. Remarks on article 5 — Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

9. Remarks on article 6 — Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to a settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 6 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

10. Remarks on article 7 — Other laws or treaties

19. Article 7, which mirrors article VII of the New York Convention would permit application of more favourable national legislation or treaties to matters covered by the draft convention. The understanding of the Working Group was that article 7 would not allow States to apply the draft convention to settlement agreements excluded in article 1, paragraphs 2 and 3, as such settlement agreements would fall outside the scope of the draft convention. However, States would have the flexibility to enact relevant domestic legislation, which could include in its scope such settlement agreements (A/CN.9/929, para. 19).

For approval of article 7 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 71; for consideration of the matter at previous sessions, see A/CN.9/929, para. 19; A/CN.9/901, paras. 65, 66 and 71; and A/CN.9/896, paras. 154, 156, and 204.

11. Remarks on the final provisions

(i) Article 8 — Reservations

20. Article 8 provides for two reservations authorized under the draft convention. Regarding the first reservation on settlement agreements involving States and other public entities, the Working Group agreed that such agreements should not be excluded from the scope. Rather, it was agreed that the treatment of such agreements could be addressed through a reservation in the draft convention. Regarding the second reservation on the application of the draft convention based on the parties' consent, the Working Group agreed that that question need not be addressed in the draft convention, but should be left to States when adopting or implementing the convention.

For approval of article 8(1)(a) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 77 and 93; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 61 and 62; and A/CN.9/861, paras. 44–46.

For approval of article 8(1)(b) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 79 and 93; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 39 and 40; and A/CN.9/896, paras. 130 and 196.

For approval of article 8, paragraphs (2) to (5) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 81–93.

(ii) Article 9 — Effect on settlement agreements

21. Article 9 addresses the impact of the entry into force of the draft convention and of any reservations or withdrawal thereof on settlement agreements concluded before such entry into force (A/CN.9/934, para. 90). Similarly, article 16(2) addresses the effect of the denunciation of the draft convention on settlement agreements concluded before such denunciation takes effect. The purpose of the provisions is to enhance legal certainty for parties to settlement agreements.

(iii) Articles 10 to 16

22. At its sixty-eighth session, the Working Group approved in substance articles 10 to 16 (A/CN.9/934, paras. 94–115).

23. The Commission may wish to note that, as indicated in para. 94 of document A/CN.9/934, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the convention, once adopted. That proposal was welcomed and supported by the Working Group. The Commission may wish to consider this offer in relation to its consideration of article 11(1).

12. Other matters

(i) General Assembly resolution

24. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

25. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument.*"

For consideration by the Working Group of the form of the instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 25 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft convention

26. The Commission may wish to note the recommendation by the Working Group that, resources permitting, the *travaux preparatoires* of the draft convention should be compiled by the Secretariat, so that they could be easily accessible and user-friendly (A/CN.9/934, paras. 146–148).